

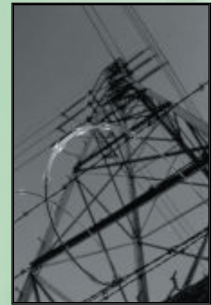


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Public Utility Recovery of Security Expenditures and Security Information Disclosure

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The protection of the nation's public utilities from natural and deliberate attack is vital to ensure reliable electricity, water, natural gas and telecommunications systems. Utilities face major costs to increase and protect the security of their energy systems. Measures might include installing cameras and alarms at facilities to developing a comprehensive security policy or upgrading the cyber network. These investments cost utilities millions of dollars, which the utilities then seek to recover from their ratepayers, with public utility commission approval.

This document offers policy options and sample state language (see the appendix) for legislatures to consider concerning utilities' cost recovery of security expenditures and disclosure of security-related information.

Cost recovery legislation attempts to balance the need for state oversight of utility expenditures on energy security with the need for utilities to be certain they will be able to recover their reasonable and prudent investments, as determined by the state commission. It authorizes utilities to recover prudent security expenditures and sometimes outlines a cost recovery process for the commission.

Utilities must provide justification for security expenditures when they approach commissions for cost recovery. Often, this requires an in-depth review by the commission of the utility's security measures, sometimes during public hearings. Disclosure of security measures at that level of detail may jeopardize public safety. Therefore, it is critical to define the required degree of security disclosure.

State policies vary widely on these issues. Thus, not all provisions in the sample state legislative language will apply in every state. NCSL recommends that state legislators and staff review the provisions in the sample language and determine which are most relevant and useful for the state.

Public Utility Recovery of Security Expenditures

Authorization of Cost Recovery

Kansas developed state legislation to direct the state public utility commission to allow a public utility to recover in rates prudently incurred costs of security measures. The legislation focuses on the prudence of expenditures and security measures as decided by the commission. The Kansas Energy Security Act, Kan. Stat. Ann. §66-1234 (2003), includes the following:

- (a) As used in this section: (b) On and after July 1, 2002, the state corporation commission, upon application and request, shall authorize electric public utilities and natural gas public utilities to recover the utility's prudent expenditures for security measures reasonably required

to protect the utility's electric generation and transmission assets or natural gas production and transportation assets by an adjustment to the utility's customers' bills. The application and request shall be subject to such procedures and conditions, including review, in an expedited manner, of the prudence of the expenditures and the reasonableness of the measures, as the commission deems appropriate. Such application and request shall be confidential and subject to protective order of the commission.

Michigan legislation authorizes the commission to recover security costs for an electric generating facility through a *security recovery factor*. If the commission approves the security recovery factor, the utility may recover the security costs. By Michigan definition, a security recovery factor means an unbundled charge for all retail customers, except for customers of alternative electric suppliers.¹

Legislative Findings

Among states that include legislative findings, within the Energy Security Act, Kan. Stat. Ann. §66-1235 (2003), Kansas chooses to address the findings in this way:

The legislature finds that:

- (a) Actual and threatened acts of terrorism directed at the American people make it clear that government must take enhanced measures to protect its citizens and provide for greater security of services essential to the public welfare.
- (b) The threat of terrorism extends to utilities that provide basic services upon which individual citizens, schools, hospitals, nursing homes, day care centers, businesses and industry rely.
- (c) Under these extraordinary circumstances, practices and procedures that would otherwise apply in regulatory proceedings shall not hamper the government in performing its most basic purposes: Providing for the security of its citizens and protecting the public welfare.

This Kansas legislation concentrates mainly on terrorism; however, states also may choose to address security measures taken to protect from natural disasters.

Timeline for Recovery

Within Michigan's Customer Choice and Electricity Reliability Act, Mich. Comp. Laws §460.10d (2002), is a specified expiration date for recovery of the security costs from customers. The state stipulates that costs recovered should be the net of any proceeds received from other sources—for example, from the insurance company.

- (13) The commission may issue an order approving, rejecting, or modifying the security recovery factor. If the commission issues an order approving a security recovery factor, that order shall be issued within 120 days of the initial hearing required [under subsection (12)]. In determining the security recovery factor, the commission shall only include costs that the commission determines are reasonable and prudent and that are jurisdictionally assigned to retail customers of the covered utility in this state. The costs included shall be net of any proceeds that have been or will be received from another source,

including, but not limited to, any applicable insurance settlements received by the covered utility or any grants or other emergency relief from federal, state, or local governmental agencies for the purpose of defraying enhanced security costs. In its order, the commission shall designate a period for recovery of enhanced security costs, including a reasonable return on the unamortized balance, over a period not to exceed 5 years. The security recovery factor shall not be less than zero.

Provisions Ensured by the Commission

The Kansas cost recovery legislation directs the commission to ensure certain provisions, including the privacy of information, procedures followed, and how to recoup the costs. Kansas lawmakers encourage utilities to keep the recovery charge confidential so that there is no determination of where and how much money is going toward security. Opponents of this provision stress that customers have a right to know how their money is spent; however, proponents believe that security improvements should remain unidentified and be rolled into rates just as taxes and other charges. Review the provisions in Kan. Stat. Ann. §66-1236 (2003):

The state corporation commission shall provide for:

(1) Confidentiality of information so that the amount of recovery requested, the amount of recovery allowed, the method of cost recovery requested and the method of cost recovery allowed is not disclosed; (2) protective orders for all filings so that the citizens' utility ratepayer board may receive and review documents if the board intervenes; (3) procedures to reflect rules of the United States nuclear regulatory commission or other regulatory bodies that govern the release of information and documentation which an applicant is required to submit to support the application or supply to the commission, commission staff or intervenors; (4) the security cost recovery charge to be unidentifiable on customers' bills; (5) the security cost recovery charge shall be allocated and added to all wholesale and retail rates and future contracts. Any contract existing on the effective date of this act, which does not specifically prohibit the addition of such charges, shall have such charges added; (6) review of security-related filings in an expedited manner with reference only to security-related items to assure that the proposed items provide enhanced security; (7) denial of any expenditure that the commission determines is not prudent or is not for security measures and approval of all other expenditures; and (8) recovery of capital expenditures over a period equal to not more than 1/2 the usable lifetime of the capital investment.

FOIA and Cost Recovery

Legislation involving the exemption of security-related information provided by a public utility for cost recovery from the freedom of information act (FOIA) will ensure that there is no public disclosure of that security information. Michigan legislation directs that security-related information, specifically that of a public utility, is exempt from disclosure under FOIA in Mich. Comp. Laws §460.10d (2002):

(15) Records or other information supplied by the public utility in an application for recovery of security costs that describe security measures, including,

but not limited to, emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and other plans for responding to acts of terrorism are not subject to the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall be treated as confidential by the commission.

Other Policy Options

States may decide to address whether utilities will have to go through a cost recovery rate case. According to a study of state regulatory commissions by the National Association of Regulatory Utility Commissioners (NARUC), 45 percent of the responding states that have directly addressed security costs have done so in a rate case context.²

States may also consider requiring the regulatory commission to submit recommendations for modifications to the scope or procedures of the law a few years after enactment of the legislation. This will allow the commission to submit adjustments to improve effectiveness of the law.

Public Utility Security Information Disclosure

The purpose of legislation to protect a public utility's security information disclosure is to define a required extent of disclosure of emergency or security measures and information. Protection of this information is important because it can aid in the planning or execution of a terrorist act.

Security measures often refer to actions taken or plans made to ensure security. Security information beyond security measures—such as facility design or vulnerable components of a power plant—also may fall under this type of legislation. Legislation can determine a balance of the amount of security measures and information protected in order to avoid further limits on the amount of information permitted for public view.

Many states have overarching legislation on the types of information excepted from the freedom of information act (FOIA) for security reasons. Kansas legislation specifically addresses security with power, water, fuels and communications in Kan. Stat. Ann. §45-221 (2003):

Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(12) Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.

(45) Records the disclosure of which would pose a substantial likelihood of revealing security measures that protect: (A) Systems, facilities or equipment used in the production, transmission or distribution of energy, water or com-

munications services; or (B) sewer or wastewater treatment systems, facilities or equipment.

Notes

1. “Alternative electric supplier” means a person who sells electric generation service to retail customers in [Michigan] state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in [Michigan] state. An alternative electric supplier is not a public utility.
2. Lawton et al, *Model State Protocols for Critical Infrastructure Protection Cost Recovery* (National Regulatory Research Institute: NARUC Ad Hoc Committee on Critical Infrastructure, July 2004).

Acknowledgments

The NCSL Energy Program thanks the Colorado Division of Emergency Management for input into and review of this document.

Appendix. Sample Legislation

NCSL prepared the following sample legislation using current state legislation. The comprehensive language offers a sample of how other states have approached cost recovery for security expenditures and information exemptions from freedom of information acts.

Note: Given the wide variation in state policies regarding public utility recovery of security expenditures, not every provision in this sample legislative language is applicable in every state. In using the sample language, please select those provisions that you feel would be most applicable and useful in your state.

SAMPLE STATE STATUTE

[Electric and/or Natural Gas] Public Utility Recovery of Security Expenditures

[Title, enacting clause, etc.]

Section 1. [Short Title.] This Act is known and may be cited as the “[Electric and/or Natural Gas] Public Utility Recovery of Security Expenditures.”

Section 2. Statement of Purpose.¹ The purpose is to authorize electric public utilities and/or natural gas public utilities to recover the utility’s prudent expenditures for security measures that are reasonably required to protect the utility’s electric generation and transmission assets or natural gas production and transportation assets by an adjustment to the utility’s customers’ bills.

Section 3. Definitions. In this act:

- A. “Electric utility” means any electric public utility.
- B. “Natural gas public utility” means any natural gas public utility.
- C. “Security cost recovery charges” means reasonable and prudent costs of new and enhanced security measures incurred by a public utility.

Section 4. [Legislative authorization to recover prudent expenditures for security measures.]

A. The state public utility commission, upon application and request, shall authorize electric public utilities and natural gas public utilities to recover the utility’s prudent expenditures for security measures that are reasonably required to protect the utility’s electric generation and transmission assets or natural gas production and transportation assets by an adjustment to the utility’s customers’ bills. The application and request shall be subject to such procedures and conditions, as the commission deems appropriate, including review, in an expedited manner, of the prudence of the expenditures and the reasonableness of the measures. Such application and request shall be confidential and subject to protective order of the commission.

B. The legislature finds that: (a) Actual and threatened acts of terrorism directed at the American people make it clear that government must take enhanced measures to protect its citizens and provide for greater security of services essential to the public welfare. (b) The threat of terrorism extends to utilities that provide basic services upon which individual citizens, schools, hospitals, nursing homes, day care centers, businesses and industry rely. (c) Under these extraordinary circumstances, practices and procedures that otherwise would apply in regulatory proceedings shall not hamper the government in performing its most basic purposes: Providing for the security of its citizens and protecting the public welfare.²

C. The state public utility commission shall provide for:

- (1) Confidentiality of information so that the amount of recovery requested, the amount of re-

covery allowed, the method of cost recovery requested, and the method of cost recovery allowed are not disclosed.

(2) Protective orders for all filings so that the citizens' utility ratepayer board may receive and review documents if the board intervenes.

(3) Procedures to reflect rules of the United States nuclear regulatory commission or other regulatory bodies that govern the release of information and documentation which an applicant is required to submit to support the application or supply to the commission, commission staff or intervenors.

(4) The security cost recovery charge to be unidentifiable on customers' bills.

(5) The security cost recovery charge shall be allocated and added to all wholesale and retail rates and future contracts. Any contract existing on the effective date of this act, which does not specifically prohibit the addition of such charges, shall have such charges added.

(6) Review of security-related filings in an expedited manner with reference only to security-related items, to assure that the proposed items provide enhanced security.³ (7) Denial of any expenditure that the commission determines is not reasonable, not prudent, or is not for security measures and approval of all other expenditures.

(8) Recovery of capital expenditures over a period equal to not more than one-half the usable lifetime of the capital investment.⁴

(9) The costs included shall be the net of any proceeds that have been or will be received from another source, including, but not limited to, any applicable insurance settlements received by the covered utility or any grants or other emergency relief from federal, state or local governmental agencies for the purpose of defraying enhanced security costs.

D. A determination by the commission of the prudence of an expenditure for security measures shall not be based on standard regulatory principles and methods of recovery and shall take fully into account the findings and intent of the legislature, as stated in Section 4.B.

E. The provisions of this act shall apply recovery of prudent expenditures for enhanced security incurred after September 11, 2001.

FOIA as it pertains to cost recovery for public utilities' security expenditures

A. Records or other information supplied by the public utility in an application for recovery of security costs that describe security measures, including, but not limited to, emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and other plans for responding to acts of terrorism are not subject to the Freedom of Information Act and shall be treated as confidential by the commission.

Note: Given the wide variation in state policies regarding public utility security information disclosure, not every provision in this sample legislative language is applicable in every state. In using the sample language, please select those provisions that you feel would be most applicable and useful in your state.

SAMPLE STATE STATUTE
Public Utility Security Information Disclosure

[Title, enacting clause, etc.]

Section 1. [Short Title.] This Act is known and may be cited as the “Public Utility Security Information Disclosure.”

Section 2. Statement of Purpose.⁵

The purpose is to define a public agency’s extent of disclosure of emergency or security information.

Section 3. Definitions. In this act:

A. “Security” means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion; or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping.

Section 4. [Public utility security information disclosure.]

A. Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

1. Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility that is used for purposes requiring security measures in or around the building or facility or that is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.

2. Records the disclosure of which would pose a substantial likelihood of revealing security measures that protect:

- a. Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services; or
- b. Sewer or wastewater treatment systems, facilities or equipment.

Notes

- 1. This is optional language for states that favor purpose statements.
- 2. States may choose to address security measures taken to protect from natural disasters as well.
- 3. States may choose to specify the amount of time by which the public utility commission must address the cost recovery request.
- 4. States may designate an appropriate time period for cost recovery to be completed.
- 5. States may consider security measures taken to protect from natural disasters as well.



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